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Supreme Court, U.S.

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No. _____

In the

Supreme Court of the United States

Angela G. McKenzie,

Petitioner,

versus

SETA Corporation,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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57 pp

QUESTIONS PRESENTED

1. Is appellate jurisdiction under the Federal Arbitration Act ["the FAA"], 9 U.S.C. § 1, et. seq., specifically under § 16 of the FAA, limited to review of district court orders confirming or denying confirmation of arbitration awards? Did the Court of Appeals err in dismissing, for lack of jurisdiction, Petitioner's post-arbitration appeals from the district court (a) order compelling arbitration and (b) orders denying her motions to vacate the award reasoning that the only final order appealable under the FAA is the order confirming the arbitral award rendered after Petitioner had already noticed and docketed her appeals?

2. Did the Court of Appeals disparately apply the jurisdictional provisions of the FAA, 9 U.S.C. § 16, inasmuch as its opinion below is in apparent conflict with this Court's decision in *First Options of Chicago, Inc. v. Kaplan, 514 U.S.* 038 (1995) as well as of other Circuits as to the jurisdictional expanse of the statute?

3. Where the Petitioner sought equitable relief under Rule 60(b)(3) of the Federal Rules of Civil Procedure upon the premise that the Respondent and its counsel obtained the order compelling arbitration by extrinsic fraud committed upon the district court, was it proper for the Appeals Court to dismiss for lack of jurisdiction Petitioner's appeal from the district court's denial of the relief she sought despite the Court's appellate jurisdiction under 28 U.S.C. § 1291 *cum* § 1294(1)?

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The opinion of the United States Court of Appeals for the Fourth Circuit in *McKenzie v. SETA Corporation, No. 99-1576* (unpublished, 4th Cir. 12/08/00) along with the Order denying the Petition for Panel Rehearing (filed 01/04/01) appear, in sequence, at pages A1 - A6 of the Appendix, hereto. The earlier, February 23, 2000, Order of the Court dismissing portion of McKenzie's appeals from the district court Orders of March 29, 1999 and April 30, 1999 appears at page A7 of the Appendix.

The Order of the District Court compelling arbitration, filed August 22, 1997, is proffered at pages A8 - A9 of the Appendix, hereto.

The Order and Memorandum Opinion of the District Court denying Petitioner's First Motion for equitable relief under Rule 60(b)(3) of the Federal Rules of Civil Procedure, filed March 29, 1999, appears at pages A10 - A13 of the Appendix.

The Order and Memorandum Opinion of the District Court denying Petitioner's Second Motion to vacate the arbitral award under 9 U.S.C. § 10 of the Federal Arbitration Act, filed April 30, 1999, is provided at pages A14 - A17 of the Appendix.

The Order of the District Court, issued May 7, 1999, confirming the arbitration award appears at page A18 of the Appendix.

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fourth Circuit dismissing Petitioner's appeals for lack of jurisdiction was filed December 8, 2000. The Petition for Panel Rehearing was denied by Order filed January 4, 2001. This Petition for Writ of Certiorari is filed within 90 days from that date, *vide* 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Seventh Amendment: Right to trial by jury

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Federal Rules of Civil Procedure, Rule 60(b)

"On motion and upon such terms as are just, the court may relieve a party ... from a final judgment, order, or proceeding for the following reasons: ... (3) fraud ..., misrepresentation, or other misconduct of an adverse party; .... The motion shall be made within a reasonable time, and for reasons ... (3) not more than one year after the judgment, order, or proceeding was entered or taken.... This rule does not limit the power of a court ... to set aside a judgment for fraud upon the court."

28 U.S.C. § 1291

"The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States. ...."

The Federal Arbitration Act, 9 U.S.C. § 1, et. seq.

"§16. Appeals

"(a) An appeal may be taken from -

(1) an order -
(A) refusing a stay of action under section 3 of this title,
(B) denying a petition under section 4 of this title to order arbitration to proceed,
(C) denying an application under section 206 of this title to compel arbitration to proceed,
(D) confirming or denying confirmation of an award or partial award, or
(E) modifying, correcting, or vacating an award.
"(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
"(3) a final decision with respect to an arbitration that is subject to this title.

"(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order –
(1) granting a stay of any action under section 3 of this title;
(2) directing arbitration to proceed under section 4 of this title;
(3) compelling arbitration under section 206 of this title; or
(4) refusing to enjoin an arbitration that is subject to this title."

§ 9. Award of Arbitrators; confirmation; jurisdiction; procedure

> "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then *at any time within one year after the award is made* any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this tittle. ...." [Emphasis added].

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

> "*Notice of motion to vacate*, modify, or correct an award *must be served* upon an adverse party or his attorney *within three months after the award is filed or delivered.* ...." [Emphasis added].

§ 10. Same; vacation; grounds; rehearing

> "(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon application of any party to the arbitration –
>
> (1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either one of them.
(3) Where the arbitrators were guilty of misconduct ...or any other misbehavior by which the rights of any party have been prejudiced.
(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. ...."

STATEMENT OF THE CASE

A. From SETA to the District Court

In January 1995, the Petitioner, Angela G. McKenzie ["McKenzie" or the "Petitioner"] sent her resume to SETA Corporation ["SETA" or the "Respondent"] in response to its advertisement for an administrative secretary. Her resume left no doubt that her educational background was limited to a high school diploma and her work experience entailed clerical, secretarial and support personnel functions. There was nothing in McKenzie's background that suggested any professional expertise in any field, including law. She is a lay person.

After review of her resume, SETA invited McKenzie to come in for interviews. She reported to SETA as scheduled and was asked to complete SETA's application form consisting of five pages inclusive of blank spaces to fill out and a certification, in fine print, pronouncing terms and conditions of her employment. McKenzie quickly filled out the blank spaces on the form, signed and tendered it. She was, thereafter, scheduled for a series of interviews and tests following which she was offered a secretarial position.

On February 20, 1995, McKenzie commenced her

employment with SETA as a Proposal Coordinator and was soon required to perform extensive overtime work including work on weekends and holidays. In April, 1995, McKenzie became pregnant but, because of her heavy work schedule, she neglected the pre-natal care she needed. On June 12, 1995, she suffered a miscarriage imputed, inter alia, to lack of pre-natal care. McKenzie duly informed SETA of her miscarriage, went through the necessary medical procedures and returned to work a few days thereafter.

By January 1996, McKenzie had already proven herself as a "very valuable and cheerful member" of the proposal team and was rewarded with two salary increases as well as other honors. January 1996 was also the month that she became pregnant again. Later in the month, after medically verifying her pregnancy, she formally informed SETA of her pregnancy and shared her good news with her coworkers and friends.

Considering the miscarriage she suffered six months earlier, the medical advice she was given to obtain pre-natal care if she became pregnant again and the particular difficulty of her pregnancy, McKenzie began to take time off from work to attend to her pregnancy-related illnesses and the medical care she needed. She had consistently notified her employer of her absences and had mostly relied on leave-without-pay to tend to her medical exigencies. Her pregnancy-induced illnesses and absences reduced her ability to afford SETA the substantial overtime work it was used to.

McKenzie became very ill the night of April 11 and, after notifying the employer of her illness, she went to her doctors on April 12. She spent the day going through various medical tests and procedures at three different medical facilities. She returned home at the end of the day only to find that her employer had attempted to reach her by phone several times. She immediately returned the calls and spoke with SETA's Human Resources Director who informed McKenzie that she has been "terminated

effective April 12, 1996, due to lack of work in the Proposal Department." She was also advised to clear out her desk by the following Monday.

Description of the shock, trauma and distress McKenzie had been caused by her sudden and unexpected termination is omitted. Suffice it to note here that Petitioner's income from her job represented the lion's share of her family's resources as her husband earned considerably less than she did. At any rate, soon after her termination, McKenzie discovered that, despite its allegation of "lack of work," SETA had in fact replaced her by a non-pregnant female of the same race as she is, Caucasian, who was transferred from a different department of SETA to assume McKenzie's responsibilities in the Proposal Department.

After delivery of her son, McKenzie filed a charge of discrimination against SETA with the Fairfax County Human Rights Commission (cross-filed with the EEOC) asserting that her employer unlawfully terminated her employment because of her pregnancy in violation of the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). Upon fulfilling all conditions precedent and securing a Notice to Sue letter from the EEOC, McKenzie filed a four count Complaint with the U.S. District Court for the Eastern District of Virginia, Alexandria Division, on July 2, 1997. She asserted a claim under the Pregnancy Discrimination Act and stated three other counts premised on the common law. ***Invoking her constitutional Seventh Amendment right, she demanded jury trial as to all of her causes of action.***

Citing a provision in the fine print of its application form, SETA moved to compel arbitration and stay the proceedings pending arbitration. It repeatedly represented to the court that McKenzie *knowingly and voluntarily" and "validly"* executed an arbitration contract to resolve her employment disputes by arbitration. With supporting affidavits from its H/R Director, Rachael Mason, SETA went further to project McKenzie's prior clerical functions in the preparation of

employee handbooks as evidence of her *"knowing and valid undertaking"* to submit to arbitration.

Based on settled contract law principles, McKenzie argued that there is no valid arbitration contract to enforce to the extent that the application form that SETA drafted and mandated required McKenzie to *"consent and agree to"* or *"understand and agree to"* all of its terms and conditions of employment except *the "arbitration clause" which required her to "understand" [but not "agree" or "consent" to]* the terms thereof. If the court deemed the terms of the form *'ambiguous'*, then "the ambiguity is resolved against the preparer of the document," i.e. SETA; *vide*, inter alia, *Williams v. First Fed. Sav. & Loan Ass'n, 651 F.2d 910 (4th Cir. 1981).* And, "(t)he rule is particularly applicable where the ambiguous provision is alleged to constitute a waiver of the right to file a lien, as it is presumed ... that one has not precluded himself from exercising a right granted by statute (in this case the Seventh Amendment)." *VNB Mtg. Corp. v. Loan Star Indus., Inc., 215 Va. 366, 209 S.E.2d 909 (1974). On the other hand, if the court* construed the application form *'unambiguous,'* then "the court is not at liberty to search for its meaning beyond the instrument itself []..... [T]he writing is the repository of the final agreement of the parties." *Management Enterprises, Inc. et. al. v. The Thorncroft Co., 243 Va. 469 (1992).*

The district court, presided by the Honorable Judge Raymond Jackson, concluded that the terms of the application form are *"unambiguous"* but proceeded to impute *"common sense interpretation" to the "unambiguous" terms* reaching the conclusion that *"understand" and "agree" are synonymous terms.* It ruled the arbitration clause valid and binding and ordered arbitration. But the court also ordered the matter be stayed and *the arbitration be concluded within 180-days from date of filing of the claims.* This Order of the district court filed August 22, 1997, appears at *pages A8 - A9 of the Appendix.*

B. The Arbitration Proceedings

On October 21, 1997, McKenzie filed her claims with the American Arbitration Association["AAA"] at a cost of $2,000.= in filing fees alone. It soon became apparent that the arbitration to which her claims were relegated were far beyond McKenzie's means. The 180-days the district court set for the completion of the arbitration process expired with no resolution. Prompted by the deadline set by the court and the overwhelming costs of the arbitration, McKenzie moved the district court to lift the stay and resume the judicial proceedings by motion filed on ***April 9, 1998.*** The court, presided by the Honorable Judge Claude Hilton denied the motion and ordered the arbitration to proceed until completion.

The parties returned to the arbitration and McKenzie moved to proceed *in forma pauperis*. Her motion was partially granted upon continuous payment of forum fees and other expenses as the proceedings required.

Over a protracted period, between August and October 1998, the arbitrator conducted hearings for disposition of McKenzie's claims. The last day of the evidentiary hearings was ***October 24, 1998.*** This was the day when SETA presented Rachael Mason, its H/R Director, as its core management witness to testify on its behalf. *And it is extremely important to note here who Rachael Mason is.* Educationally, she holds a B.S. in Biopsychology and a Masters degree in Human Resources Development. Relative to McKenzie's high school level education, Ms. Mason's educational qualifications are beyond compare. Ms. Mason also has extensive experience in human resources management and, at the time, was in charge of SETA's personnel management and administration functions including enforcement of SETA's application form (consisting of the arbitration clause) which McKenzie filled out upon recruitment. Again, relative to McKenzie's clerical background

in assembling employee manuals, Ms. Mason's expertise and experience is beyond compare. No less significant is the role Ms. Mason played in supporting SETA's motion to compel arbitration in the district court - her affidavits were core components of the defense motion.

During her testimony, SETA's counsel (who obtained the Order compelling arbitration) revealed the following:

> **"This *(Ms. Mason) is obviously not an attorney.* And I don't have a problem with if there are conversations that Mr. Mekbib wants to inquire about on this particular topic, *as long as it is clearly understood, obviously, this witness (Ms. Mason) wouldn't know what arbitration is unless somebody knowledgeable in the law explained the situation to her.*"**

The revelation also made "obvious" that, when SETA took away *McKenzie's Seventh Amendment constitutional right to jury trial* upon the premise of its arbitration clause, it knew it was defrauding her. For it knew that McKenzie is *"obviously not an attorney"* and *"wouldn't know"* and did not know *"what arbitration is unless somebody knowledgeable in the law explained [it] to her."* It failed to advise her to obtain counsel or provide her "somebody knowledgeable in the law" to explain to her the commitment it secured from her before dashing her fundamental right by deceit and fraud.

The revelation further made "obvious" that when SETA and its counsel repeatedly proffered to the district court that McKenzie *"voluntarily, knowingly and validly"* assented to the arbitration clause (which eviscerated her jury trial rights), they knew each of their representations to be untrue, misleading and fraudulent. For they knew that McKenzie, as a lay person with

only a high school diploma, could not possibly *"voluntarily, knowingly and validly"* assent to an arbitration clause that SETA's own H/R director *"wouldn't know unless somebody knowledgeable in the law explained [it] to her."* When they went so far as to suggest to the district court that McKenzie's clerical functions in the preparation of employee handbooks with a former employer indicated her knowledge of the arbitration clause, they knew they were misleading and defrauding the court. *Having concealed what they knew to be true and having represented what they knew to be untrue to the district court, SETA and its counsel obtained the Order of August 22, 1997 compelling arbitration by fraudulent representations and fraudulent concealment perpetrated upon the court.*

With the arbitrator concluding that the validity of the arbitration clause is not an issue before him, the hearings were concluded. On January 7, 1999, the arbitrator's award was delivered to McKenzie. He dismissed her claims by imposing on her a burden of proof beyond the realm of civil or criminal law mandates and upon disregard of the law he knew:

> **"Absent *direct evidence of discriminatory intent* and absent proof that [McKenzie's] pregnancy, as distinct from excessive absenteeism, was the reason for her separation, [her] - sic - PDA [Pregnancy Discrimination Act] claims must be rejected."**

Yet, the statute cited and proffered to the arbitrator provides *"an unlawful employment practice is established when the complaining party demonstrates that ... sex ... was a motivating factor for any employment practice, even though other factors also motivated the practice."* Title VII, 42 U.S.C. § 2000e-2(m). And, as Chief Judge Richard Posner noted:

"One kind is evidence that can be interpreted as an *acknowledgment of discriminatory intent* by the defendant or its agents [citations omitted]. Such evidence *is indeed direct evidence* as distinct from circumstantial; and ***since intent to discriminate is a mental state and mind reading is not an acceptable tool of judicial inquiry,...*** [*Direct evidence*] *is the equivalent of an admission of guilt by the defendant.*" Troupe v. May Dept. Stores Co., *20 F.3d 734, 736-7 (7th Cir. 1994).* And this was an authority the arbitrator purportedly relied on!

C. Post-Arbitration District Court Proceedings

On March 8, 1999, *within 90-days from the date of the award,* McKenzie filed with the district court her "First Motion to Rescind the Order Compelling Arbitration, Vacate the Arbitral Award and be Granted her Constitutional Demand for Jury Trial" [*"First Motion."*] She premised her motion on *two independent statutory jurisdictional bases.* First, she sought relief under the specific provisions of *Rule 60(b)(3) of the Federal Rules of Civil Procedure ["F. R. Civ. P."]* which grants *relief from judgment or order obtained by fraud committed upon the Court,* in this case SETA's procurement of the Order compelling arbitration by fraudulent representations of material facts to the court and fraudulent concealment of material facts from the court. She also sought relief under the FAA, 9 U.S.C. § 10(a)(1) *cum* Kentucky River Mills v. Jackson, *206 F.2d 111, 112 (6th Cir. 1953),* cert. denied *346 U.S. 887, 74 S.Ct. 144 (1953)* holding:

"[In] action upon arbitration award by party against whom award is made can raise any

> defense - sic - (including fraud and undue means) it could have raised under statutory proceeding for order directing arbitration to proceed in accordance with contract, 9 U.S.C. §§ 1 et. seq."

McKenzie also moved the district court to grant her a hearing on her *First Motion* per dictums of settled law:

> "It is beyond question that a federal court may investigate a question as to whether there was fraud in the procurement of a judgment. *Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 66 S.Ct. 116.* ... **This is to be done in adversary proceedings as in the case before us.** *See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997; ... Sprague v. Tictonic National Bank, 307 U.S. 161, 59 S.Ct. 777; United States v. Throckmorton, 98 U.S. (8 Otto) 61, 25 L. Ed. 93." Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985).*

While her *First Motion* was pending, McKenzie also filed her "Second Motion to Vacate the Arbitral Award Rendered in Favor of the Defendant and be Granted Her Constitutional Demand for Jury Trial" [*"Second Motion"*] on April 6, 1999, *within 90-days from the date of the award.* In her motion, she enunciated the arbitrator's imperfect execution of his powers, his evident partiality and misbehavior, *his manifest disregard of the law he knew and imposition on her a burden of proof never envisioned by any civil or criminal law, vide* the FAA, 9 U.S.C. § 10. She noted, upon the record of the evidence proffered to the Court, the fulfillment of each element

of her causes of action including disparate treatment and discharge from her job to be replaced by a non-pregnant female despite SETA's claim that it laid her off because of lack of work. She proffered evidence that, contrary to Ranvir Trehan's, SETA's president and owner, initial claim that he did not know she was pregnant when he terminated her, that he did, in fact, know of her pregnancy and pregnancy-related illnesses but that, and we quote his testimony:

> **"Sir, I come from a culture where you do not delve into the women's bodies. Somehow, you may not understand that. I come from a culture where that does not happen very much. And I am not comfortable with women talking to me about those kinds of things (i.e. their pregnancies, miscarriages, illnesses or their uniquely female problems)."**

Although, unbeknown to her, McKenzie was subjecting her second level supervisor and ultimate boss, Ranvir Trehan, to cultural discomfort in explaining to him the complications of her pregnancy and related medical conditions, he had no cultural barriers in learning about the disabling medical conditions of his male employee who he declared: *"(w)e accommodated him for a very long period of time. When I say 'very long' over six months."* Her claims were sustained by what may well be clear and convincing standard.

By its Order and Memorandum Opinion, filed March 29, 1999, *[pages A10-A13 of the APPENDIX]*, the district court, presided by the Honorable Judge Claude Hilton, denied McKenzie's *First Motion* without affording her even a routine motion hearing and without touching upon the evidence of fraud she presented tangent to the Rule 60(b)(3) relief she requested. Instead of addressing the specific evidence of fraud McKenzie

proffered upon the record of the arbitral proceedings on October 24, 1998, the court reached its conclusion by equating her *First Motion* with her April 9, 1998, motion seeking resumption of the judicial proceedings. *The record was clear that the evidence of fraud presented to the district court was discovered over six months after the April 9, 1998 motion.*

The district court also denied McKenzie's *Second Motion* by its Order and Memorandum filed April 30, 1999, [pp. A14-A17 of the APPENDIX.] The rationale for the denial were the 'federal policy favoring arbitration' and the interest in preserving "the binding" finality of the arbitration process.

Meantime, on April 21, 1999 *(one hundred and three days after the issuance of the arbitral award)*, SETA filed its Motion to Confirm the Arbitration Award (at page A18 of the Appendix.*)*

D. The Appellate Proceedings

On April 28, 1999, McKenzie noticed and filed her appeal from the district court Order of March 29, 1999 denying her *First Motion* and the Order of August 22, 1997 compelling arbitration. She did so, pursuant to F.R.A.P. Rule 4(a), within 30 days from the date of the order denying the Rule 60(b)(3), F. R. Civ. P. relief to rescind the Order compelling arbitration.

On May 5, 1999, five days after the denial of her *Second Motion*, McKenzie amended her Notice of Appeal and filed her appeal from the Order of April 30, 1999 denying vacateur of the arbitral award.

While the appellate proceedings were in progress and aware of the proceedings as well as the absence of any accord between the parties for judicial confirmation of the award (mandate of FAA, 9 U.S.C. § 9), the district court [by Judge Hilton] granted SETA's motion to confirm the arbitration award by its Order filed May 7, 1999. McKenzie did not notice an

appeal from this post-appeal order of the district court.

Briefing schedules were established by order of the Court of Appeals and McKenzie filed her Opening Brief and Joint Appendixes (consisting of 1135 pages) on June 21, 1999 as scheduled. On July 23, 1999, eighteen days from the due date for its Answering Brief, SETA filed its *"Motion to Dismiss Portion of Appeal for Lack of Jurisdiction."* Upon filing of this defense Motion, the Court suspended the Briefing schedules.

The premise for SETA's Motion was the argument that the district court Order of March 29, 1999, denying McKenzie's *First Motion,* and the Order of April 30, 1999, denying McKenzie's *Second Motion*, are not final decisions within the purview of the FAA, 9 U.S.C. § 16, and that the only final decision appealable under the statute is the Order confirming the arbitration award which McKenzie did not appeal. However, *SETA conceded in its motion appellate jurisdiction with respect to McKenzie's appeal from the August 22, 1997 district court Order compelling arbitration* stipulating as follows:

> **"Appellee SETA Corporation *is not moving* to dismiss the appeals as to the August 1997 Order. As explained below, section 16 of the Federal Arbitration Act generally precludes review of orders staying litigation pending arbitration proceedings *'until after the arbitration has gone forward to a final award.'* *American Cas. Co. v. L-J, Inc., 35 F.3d 133, 135 (4th Cir. 1994) (internal citations and quotations omitted.)"***

As fully amplified in the arguments below, McKenzie opposed SETA's motion proffering, inter alia, that:

[A] The Court's jurisdiction over her appeal from the Order of March 29, 1999, denying her *First Motion*, is

independent of any provision of the FAA inasmuch as it seeks relief under Rule 60(b)(3) of the F. R. Civ. P. and is subject to appellate review under the Court's plenary jurisdiction pursuant to 28 U.S.C. §§ 1291 *cum* 1294(1).

[B] Even if McKenzie's appeals from both orders of the lower court were controlled by the FAA, SETA's arguments are belied by the clear and specific language of the statute itself. FAA, 9 U.S.C. § 16 which defines appellate jurisdiction reflects the Congressional intent to create separate and parallel appeals avenues distinguished between parties favored by and parties aggrieved (disfavored) by arbitral awards. Thus, *FAA § 16(a)(1)(D)* provides specifically for *appeal from an order "confirming or denying confirmation of an award or partial award."* Independent of this provision, *FAA § 16(a)(3)* provides for appeal from any order which is *"a final decision with respect to an arbitration that is subject to this title."* McKenzie's appeals from the orders below are "final decisions" as envisioned by 9 U.S.C. § 16(a)(3).

[C] In lodging her appeals, McKenzie detrimentally relied upon the published opinion of the Fourth Circuit which unequivocally asserts jurisdiction to review "as a final judgment" all district court orders under 9 U.S.C. § 10; dicta: ***"We then (i.e. after district court denial of motion to vacate adverse arbitral award) may review as a final judgment any district court action pursuant to 9 U.S.C. § 10."*** Humphrey v. Prudential Securities, Inc., *4 F.3d 313, 319 (4th Cir. 1993).* Further, McKenzie enunciated various decisions of several Circuit Courts which exercise jurisdiction over appeals from denial of motions to vacate arbitral awards.

By its Order filed February 23, 2000, the Court of Appeals granted SETA's motion and dismissed McKenzie's appeals from the district court Orders of March 29, 1999 and April 30, 1999. It offered no explanation. Said Order of the Court appears at page A7 of the Appendix hereto.

Upon partial dismissal of McKenzie's appeals, the Court established a new Briefing Schedule with respect to the remaining portion of the appeal, i.e. the appeal from the district court Order of August 22, 1997, compelling arbitration.

SETA filed its Answering Brief as scheduled. Reversing its earlier jurisdictional concession, it argued that the Appeals Court does not have jurisdiction to review the appeal from the Order compelling arbitration because the order is interlocutory and the only final order the Court may review under the FAA is the May 7, 1999 district court order confirming the arbitration award which McKenzie did not appeal.

As more fully propounded below in the arguments, McKenzie defended her appeal upon the language of the FAA, prior decisions of the Court as well as the holdings of other Circuits. She reiterated her claim to relief independent of the FAA and as envisioned by Rule 60(b)(3) of the F. R. Civ. P. which, thus, brings her appeal within the plenary jurisdiction of the Court pursuant to 28 U.S.C. § 1291.

By *per curiam* opinion rendered December 8, 2000, the Court dismissed McKenzie's remaining appeal concluding that the Order compelling arbitration is interlocutory and "is not by itself an appealable order" and the only final order subject to appellate review is the order confirming the arbitration award. [Please see pages A1 - A5 of the Appendix hereto.]

On December 21, 2000, McKenzie filed her Petition for Panel Rehearing in which she enunciated that her claim for relief by her *Second Motion* under F. R. Civ. P., Rule 60(b)(3) for fraud committed upon the Court in the procurement of the August 22, 1997 Order compelling arbitration is within the plenary jurisdiction of the Court pursuant to 28 U.S.C. § 1291 *cum* §1294(1). By Order filed January 4, 2001, the Court denied the Petition for Rehearing [please see page A6 of the Appendix hereto]. This Petition ensued.

ARGUMENTS FOR ALLOWANCE OF WRIT OF CERTIORARI

A. The Jurisdictional Issues Addressed by the Court of Appeals Involve Important Questions of Federal Law Which Have Not Been, But Should be, Settled by this Court

As this Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647 (1991), Green Tree Financial Corp. v. Randolph, 531 U.S. __ (2000)* and its recent decision in *Circuit City Stores v. Adams, No. 99-1379, decided March 21, 2001, ___ U.S. ___, ___ S.Ct. ___ (2001)* reflect, arbitration has not only become an integral part of our nation's civil justice system but is also assured a profoundly expanded role. For the functioning of the arbitration system as intended and effectively in its expanded role, the supervision and control by the Federal judiciary as envisioned by the FAA, 9 U.S.C. § 1, et. al., is even more so important. Therefore, this Court's disposition of the issues of appellate jurisdiction herein would resolve with finality the scope of supervision and control the Appeals Courts must exercise to ensure that the arbitration process does not go amok of Congressional goals and intent.

McKenzie respectfully submits that the Opinion below unduly restricts the powers of the Courts of Appeals, is inconsistent with the clear language of the statute (the FAA), is not in accord with the Congressional scheme and intent underlying the FAA and is unwarranted by settled principles of statutory interpretation. Furthermore, as enunciated below in Part B, the Opinion is in conflict with a relevant decision of this Court and the decisions of other United States courts of appeals on the same important appellate jurisdictional issue.

Under the FAA, ***Congress*** has made clear its intent to subject the arbitration process and arbitral awards to judicial

review and scrutiny both at district court and court of appeals levels. In so doing, it ***has created a parallel scheme of judicial review upon dichotomy of actions to be taken by two distinct parties: Parties disfavored or aggrieved by arbitral awards and parties favored by awards. The procedures to be followed by the two parties are parallel, distinct and separate from each other as the statutory scheme of the FAA clearly connotes.***

Thus, the actions the party aggrieved by an arbitral award may take both at the district and appellate court levels are addressed by provisions uniquely crafted for the purpose. The first of this provisions is FAA § 12 which defines a specific period of time for what the aggrieved party may do. Hence, it provides: *"Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney* ***within three months after the award is filed or delivered."*** And this time frame is deemed *a "statute of limitation"* that forecloses any action by the aggrieved party regardless of actions which may be undertaken by the party favored by the award. To wit, it has been held:

> **"Once the three-months period after arbitration award is filed or delivered during which the Federal Arbitration Act requires that motions to vacate be served within 9 U.S.C. § 12 has expired, attempt to vacate arbitration award cannot be made *even in opposition to a motion to confirm award."*** *Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986). See also Florasynth, Inc. v. Pickholz, 750 F2d. 171 (2nd Cir. 1984).*

Likewise, Congress has distinctly defined the grounds upon which the aggrieved party may move to seek vacateur of

an award. These are provided in § 10 of the FAA and demonstrate the intent of Congress to ensure that the arbitration process would not run amok of the standards of integrity and fairness the civil justice system requires. They include bases that attempt to squelch "corruption, fraud and undue means" in the award process, those that seek to supervise and control arbitrators' conduct including "evident partiality," "imperfect execution" of arbitral powers, or "any other misbehavior by which the rights of any party have been prejudiced" - including, of course, manifest disregard of law or evidence.

By contrast to and as distinct from the actions a party aggrieved by an award may seek to obtain the jurisdictional control and supervision of the district courts, Congress has separately and independently provided for district court action that may be taken by the party favored by an award. Hence, § 9 of the FAA instructs:

> ***"If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration***, and shall specify the court, then ***at any time within one year after the award is made*** any party to the arbitration may apply to the court so specified for an order confirming the award ...."

As is evident from this provision, the ***dichotomy*** Congress has intended and defined by clear mandates of law between district court actions available for parties aggrieved by arbitral award (such as the Petitioner) and those available for parties favored by an award (such as SETA) could not be more profound. *The rights granted to the party disfavored by an award for district court action to vacate the award under § 12 of the FAA and upon the grounds provided for in § 10 of the*

*Act are **statutory** in nature.* By contrast, the district court action a party favored by an award may seek is not a matter of statutory right but is ***contractual*** in nature, i.e. such a party may move to confirm the arbitration award *only* ***"(i)f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award,"*** vide, FAA § 9. It is noted the district court was made aware that no such agreement exists between SETA and McKenzie!

Consistent with the parallel scheme envisioned, the FAA § 9 also stipulates a time frame the party favored by the award has to move to confirm the award - "any time within *one year* after the award is made" - as contrasted by the *three-month* statute of limitation imposed on the disfavored party to move to vacate the award. And the confirmation proceeding itself "is intended to be summary: confirmation can only be denied if an award has been corrected, vacated or modified in accordance with the Federal Arbitration Act." Taylor, *op. cit., at 255.*

The intent of Congress to create ***a parallel scheme of appellate procedures*** for parties aggrieved by and parties favored by arbitration awards is no less evident in the provisions of the FAA. To this end, § 16 of the FAA provides in relevant parts:

> "(a) An appeal may be taken from -
> "(1) an order -
> "(D) confirming or denying confirmation of an award or partial award, or
> "(E) modifying, correcting, or vacating an award.
> "(3) a final decision with respect to an arbitration that is subject to this title."

As with the *parallel procedures* designed for district court proceedings, Congress has also devised ***parallel***

jurisdictional authority for redress to be sought in the United States courts of appeals. Thus, appeals from district court actions pertaining to *contract-based confirmation proceedings* initiated by the party favored by arbitral award under § 9 of the FAA are subject to appellate jurisdiction and review pursuant to § 16(a)(D) of the FAA. On the other hand, appeals from district court orders upon motions to vacate adverse arbitral award by parties aggrieved by arbitral award are subject to appellate jurisdiction and review as "final decisions" within the purview of § 16(a)(3) of the FAA - dicta: *"We ... review as final judgment any district court action pursuant to 9 U.S.C. § 10."* Humphrey v. Prudential Securities, Inc., *4 F.3d 313, 319 (4th Cir. 1993).*

Consistent with the *parallel procedures* designed by Congress and defined by clear law for parties aggrieved by an arbitral award, McKenzie filed with the district court her motions to vacate the arbitral award upon the grounds envisioned by § 10 of the FAA and within the three-months statutory period prescribed by § 12 of the Act. Per F.R.A.P. Rule 4, within 30-days from the final judgments of the district court denying her motions, she noticed and docketed her appeals therefrom for review under the jurisdictional authority of the Appeals Court not only under the parallel appellate procedure established by § 16(a)(3) of the FAA but also, as explained in Part C (below), under the plenary jurisdiction of the Court pursuant to 28 U.S.C. § 1291 *cum* § 1294(1).

Despite such clarity of law and procedure, the Appeals Court dismissed Petitioner's appeals upon the premise:

> "In an earlier order we dismissed McKenzie's appeal from the orders denying her motions to vacate the arbitration award. Those orders are not designated as appealable under the FAA, nor do they represent *a 'final decision'* under the

> Act. *See 9 U.S.C. § 16(a)*.... The one remaining order McKenzie seeks to challenge, *the interlocutory order granting the motion to compel arbitration, is not by itself appealable under the FAA*. .... we are without jurisdiction.
>
> "We would have jurisdiction *if McKenzie had appealed from the confirmation order*. ...."
> [Page A5 of the Appendix, emphasis added.]

Not only that the judgment of the Court is in error for its misapprehension of the intent of Congress to create parallel and independent judicial procedures for parties favored and parties disfavored by arbitral awards to pursue judicial remedies (as heretofore enunciated), but has also thrown the FAA into a state of confusion requiring this Court's exercise of supervisory power and resolution of the jurisdictional issues with finality.

The decision suggests that the only "final judgment" appealable under the FAA is the confirmation order. Yet, per clear language of § 16(a)(1)(D), the order "confirming or denying confirmation of an award or partial award" is precisely what the FAA *does not* refer to as *"final judgment."* It only defines it as an appealable order and not "a final judgment" envisioned by § 16(a)(3).

The judgment below is also erroneous because it *subjects* parties aggrieved by arbitral awards and seeking ***statutory redress*** under §§ 12 *cum* 10 of the FAA *to subservience* to the actions the party favored by the award may or may not choose to take based upon ***contract-based rights***. In this regard, the judgment of the Court has reversed the *parallel judicial procedures* established by Congress and made the statutory rights of the disfavored party *dependent* on the contract-based rights of the favored party. It does not require much craftiness for the party favored by an arbitral award to

destroy the statutory redress afforded to the opponent. Considering that such a party is granted a full year from date of the award to move to confirm that award {*vide* § 9 of the FAA} as opposed to the aggrieved party who must act upon his/her statutory rights within three-months, it is within the power and pure discretion of the favored party to move to confirm the award well after the opponent has exercised appellate rights to redress district court denial of motion to vacate. This would represent not an issue of "final judgment" but the grant of a *"veto power"* to one party in the proceedings!

No less erroneous, perhaps even puzzling, is the conclusion of the Appeals Court that it has no jurisdiction to review McKenzie's appeal from the August 22, 1997 order compelling arbitration. While it is true that orders to compel arbitration are interlocutory and, thus, not subject to immediate appeal [*vide* § 16(b) of the FAA], the Court itself has recognized jurisdiction to review such appeals ***"after the arbitration has gone forward to a final award"*** *American Cas. Co. of Reading Pennsylvania v. L. J., Inc., 35 F.3d 133, 136-137 (4th Cir. 1994). The record leaves no doubt that McKenzie's appeal from the Order was lodged after the arbitration has proceeded to final award!*

It is indubitable that the Court of Appeals has jurisdiction granted by the FAA to review each appeal McKenzie lodged from the three orders of the district court. The dismissal of her appeals for lack of jurisdiction represents substantial departure from the FAA's clear mandates, the underlying intent of Congress, and fundamental justice in an exceptionally significant area of federal law.

Even more important, however, is the extent to which the judgment below conflicts with a unanimous decision of this Court as well as the decisions of several United States courts of appeals. This submission is amplified below.

B. The Judgment of the Appeals Court is in Direct Conflict with the Unanimous Decision of this Supreme Court in *First Options of Chicago, Inc. v. Kaplan, 513 U.S. 938 (1995)* as well as the Decisions of Other Circuits

In *First Options of Chicago, Inc. v. Kaplan, 513 U.S. 938, 115 S.Ct. 1920 (1995)* this Court unanimously held:

> "Court of Appeals should accept district court's findings of fact regarding ***agreement to submit issue to arbitration*** if not 'clearly erroneous' but decide questions of law *de novo*, ***regardless of whether district court has confirmed or denied confirmation of arbitration award.***"

By her *First Motion*, McKenzie sought to rescind the Order of August 22, 1997, compelling arbitration because the district court's findings of fact are clearly erroneous and the conclusions of law under Virginia's law are substantially flawed. There has never been a valid arbitration contract between SETA and McKenzie to arbitrate any dispute, any matter. Moreover, McKenzie claimed relief under Rule 60(b)(3) of the F. R. Civ. P. impelled by compelling, clear and convincing evidence that SETA obtained the Order by fraud and deceit perpetrated upon the district court and involving an officer of the court.

Her appeals from this district court order and the Order of March 29, 1999 (denying vacateur) are beyond the realm of inquiry as to *"whether the district court has confirmed or denied confirmation of the arbitration award."* *Kaplan* instructs so and with sound reason.

As McKenzie has pleaded in her motions, briefs and petitions before the courts below, there is no 'federal policy favoring arbitration' that can be superimposed to subject her to

arbitration absent a knowing and voluntary accord to submit to arbitration. The duty to arbitrate a dispute flows from a voluntary and knowing agreement which, in turn, is determined by applying "ordinary state-law principles that govern the formation of contracts." *Kaplan, op. cit., 514 U.S. 943; see also Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 1255 (1989)* - dicta: "courts to enforce privately negotiated agreements to arbitrate, like other contracts, according to their terms;" *Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63, 115 S.Ct. 1212, 1218-1219 (1995); Dean Witter Reynolds, Inc. v. Bird, 470 U.S. 213, 219; 105 S.Ct. 1238, 1241 (1985), inter alia.*

Whereas the appeals before the Court pertain to McKenzie's challenges that she was deprived of her jury trial rights in the absence of a valid contract to arbitrate her dispute, it would elevate form over substance to conclude that the status of the award of the arbitration she challenges determines the fate of her appeals and the jurisdiction of the Court. The dismissal of McKenzie's appeals because appeal was not lodged from the order of the district court confirming the award issued during the pendency of the appeals before the Appeals Court is in direct conflict with the *Kaplan* ruling and the *raison d'etre* of the decisions of this Court herein cited.

The Courts of Appeals are specifically instructed and are vested jurisdiction to review district court orders on arbitrability issues by the "clearly erroneous" standard as to factual findings and *de novo* as to conclusions of law "**regardless** of whether district court has confirmed or denied confirmation of arbitration award." This is the unanimous tenet of this Court. Since the subject issue is to be reviewed independent of the presence or absence of confirmation awards, whether or not McKenzie appealed the district court order confirming the arbitration award is entirely irrelevant to the jurisdiction of the Appeals

Court to review her appeals. The decision below is in direct conflict with this Court's decisions as herein proffered.

It is also of moment here to note that the Courts of Appeals routinely exercise jurisdiction over district court orders denying motions to vacate arbitral awards as in this case. To wit, inter alia:

The Third Circuit in *Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1505 (3rd Cir. 1994)* reviewing the denial of motion to vacate arbitral award and the confirmation of the award, reversed the district court's order confirming the award and directed vacateur of award against appellants - all within the appellate jurisdiction the Court under the FAA.

The Ninth Circuit in *Western Employers Ins. V. Jefferies & Co., 958 F.2d 258 (9th Cir. 1992)* reviewing district court denial of motion to vacate arbitral award, reversing and ordering vacateur. The Fifth Circuit in *McILROY v. PaineWebber, Inc., 989 F.2d 817, 819 (5th Cir. 1993)* reviewing *de novo*, within its appellate jurisdiction, district court order denying motion to vacate or modify arbitration award and affirming. The Seventh Circuit *In re VMS Securities Litigation, 21 F.3d 139 (7th Cir. 1994)* reviewing district court order enjoining enforcement of arbitration award but refusing to vacate award.

The writ of certiorari should be granted.

C. McKenzie's Appeal from District Court Denial of Her Motion for Relief Under Rule 60(b)(3) of the F. R. Civ. P. is Within the Plenary Jurisdiction of the Appeals Court to Review

The gravamen of McKenzie's *First Motion* was the relief she sought under Rule 60(b)(3), F. R. Civ. P., predicated on clear and convincing evidence, that SETA obtained the August 22, 1997, district court order compelling arbitration by fraud and deceit committed upon the court.

McKenzie asserted her claim acutely aware that "fraud on the court is a serious allegation ... involving corruption of the judicial process itself" *Cleveland Demolition Co., Inc. v. Azcon Scrap Corp., 827 F2d 984, 986 (4th Cir. 1987).* And she is impelled by the strength of her evidence that she was deprived of the free exercise of her Seventh Amendment right to jury trial because of extrinsic fraud perpetrated upon the court and involving a member of the court.

In apparent and clear abuse of discretion, the district court never touched upon her evidence. Indeed, the court below did not even grant her a routine hearing on her motion despite her request to be heard. Yet, controlling law instructs that such allegations be adjudicated in adversarial proceedings: "It is beyond question that a federal court may investigate a question as to whether there was fraud in the procurement of a judgment. *Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 66 S.Ct. 116. ...* **This is to be done in adversary proceedings as in the case before us.** *(Citations omitted)" Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985). Also Great Coastal Express, Inc. v. International Brotherhood of Teamsters, etc. 675 F.2d 1349, 1352-53 (4th Cir. 1982).*

Nevertheless, the district court did point out, in its Order and Memorandum filed March 29, 1999, that it was acting under F. R. Civ. P. Rule 60(b)(3) in denying McKenzie's motion: "The plaintiff has the burden *under Fed. R. Civ. P. [Rule] 60* to prove that there was misconduct on the part of the defendant by clear and convincing evidence ...." [Page A12, Appendix].

Thus, in filing her appeal from this Order of the district court, McKenzie left no doubt that she was invoking the jurisdictional authority of the Court of Appeals under ***28 U.S.C. § 1291*** providing: ***"(t)he courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States."*** She cited this statutory authority as her jurisdictional basis on her docketing statement, indicated

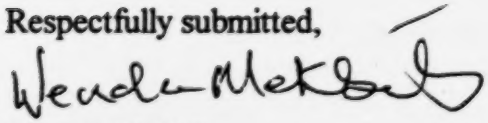
it as jurisdictional basis in her briefs and petitions before the Court. And, there is nothing to suggest that this statutory authority of the Court is subsumed by the FAA with respect to the relief McKenzie sought under Rule 60(b)(3). The Court itself has acted within said on appeal from district court action on motion for Rule 60(b)(3) relief; *see Square Construction Co v. Washington, etc., 657 F2d 68, 72 (4th Cir. 1981).*

It is apparent that the dismissal of McKenzie's appeals, at least with respect to her appeals from the August 22, 1997 Order and the Order of March 29, 1999, denying equitable relief under F. R. Civ. Rule 60(b)(3), is not supported by lack of jurisdiction. Considering McKenzie's gargantuan endeavors to be heard on her appeals pursuant to 28 U.S.C. 1291, it cannot be suggested that the dismissal of the appeals was simple error or omission. Writ of Certiorari should be granted to remedy the substantial departures from substantive law.

CONCLUSION

WHEREFORE, for the reasons heretofore enunciated, the Petitioner respectfully requests that her Petition for a Writ of Certiorari be GRANTED for the ultimate purpose of remanding her appeals for review on merits.

Respectfully submitted,



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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ANGELA G. MCKENZIE,
Plaintiff-Appellant,

v.

SETA CORPORATION,
Defendant-Appellee.

No. 99-1576

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Chief District Judge.
(CA-97-1038)

Argued: November 3, 2000

Decided: December 8, 2000

Before WIDENER, MICHAEL, and MOTZ, Circuit Judges.

Dismissed by unpublished per curiam opinion.

COUNSEL

ARGUED: Wendu Mekbib, LAW OFFICES OF WENDU MEKBIB, Vienna, Virginia, for Appellant. Richard Mark Dare, REED, SMITH, HAZEL & THOMAS, L.L.P., Falls Church, Virginia, for Appellee. **ON BRIEF:** Michael C. Montavon, MICHAEL C. MONTAVON, P.C., Fairfax, Virginia, for Appellee.

On October 2, 1996, McKenzie filed a formal charge with the Fairfax County Human Rights Commission, alleging sex and pregnancy discrimination in SETA's decision to terminate her. The Human Rights Commission issued her a notice of right to sue. McKenzie subsequently filed this action in federal court, alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, wrongful discharge, intentional infliction of emotional distress, and breach of contract. SETA moved to compel arbitration on the ground that McKenzie had signed an employment application that included an arbitration clause. The application provided:

> I understand and agree to the following:
>
> . . . .
>
> . . . I understand that all controversies, claims, and/or disputes arising out of the termination of my employment with SETA Corporation shall be settled exclusively through binding arbitration.

The district court granted SETA's motion and stayed the case pending the completion of arbitration. The parties proceeded with arbitration, and on January 6, 1999, the arbitrator dismissed all of McKenzie's claims against SETA. In particular, the arbitrator concluded that McKenzie had not proven that SETA terminated her because of her pregnancy. SETA was required to pay the arbitrator's compensation and the other expenses of arbitration.

At this point, the procedural history of this action becomes important because the timing and nature of certain motions and orders in district court affect whether we have jurisdiction to hear this appeal. On March 8, 1999, McKenzie filed a motion to vacate the arbitral award, arguing that SETA fraudulently induced her to sign the employment application by concealing its (SETA's) knowledge that nonlawyers do not understand arbitration clauses. The district court denied the motion on March 29, 1999, reasoning that SETA's conduct did not rise to the level of fraud. On April 6, 1999, McKenzie filed a second motion to vacate the arbitral award, claiming that the arbitrator displayed partiality and a manifest disregard for the law by requiring direct evidence of SETA's discriminatory intent. On April 21,

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1999, before the district court ruled on the second motion to vacate, SETA moved to confirm the arbitral award. On April 28, 1999, McKenzie noted an appeal from the district court's March 29, 1999, order denying her first motion to vacate and from the court's August 22, 1997, order compelling arbitration. On April 30, 1999, the district court denied McKenzie's second motion to vacate, concluding that she had failed to show actual bias on the part of the arbitrator and that the arbitrator's misapplication of the law is not a ground for vacating his award. On May 5, 1999, before the district court ruled on SETA's motion to confirm, McKenzie filed an amended notice of appeal, noting an appeal from the order denying her second motion to vacate. Two days later, on May 7, the district court entered an order confirming the arbitral award. McKenzie did not take an appeal from the confirmation order.

After McKenzie filed her briefs in our court, SETA moved to dismiss, for lack of jurisdiction, McKenzie's appeal insofar as it challenged the orders denying the motions to vacate. SETA argued that these orders are not appealable under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16. The FAA provides that an appeal may be taken from, among other things, an order "confirming or denying confirmation of an award or partial award," an order "modifying, correcting, or vacating an award," and "a final decision." 9 U.S.C. § 16(a). A final decision is one that "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 731 (4th Cir. 1991) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). SETA argued that the orders *denying* the motions to vacate do not fall into any of the enumerated categories, nor are they final decisions because the litigation here continued and the district court still had something to do, that is, confirm the arbitral award. Therefore, according to SETA, the district court's "final decision" was rendered on May 7, 1999, when it confirmed the arbitral award. The confirmation order was an appealable order, but McKenzie failed to take an appeal from that order. We accepted SETA's argument and dismissed McKenzie's appeal with respect to the two orders denying the motions to vacate. *See McKenzie v. SETA Corp.*, No. 99-1576 (CA-97-1038) (4th Cir. Feb. 23, 2000). Accordingly, all that remains in the present appeal is McKenzie's challenge to the district court's order compelling arbitration.

II.

McKenzie asserts that she is entitled to a trial by jury and that the district court should not have ordered the parties to resolve their dispute through arbitration. She first argues that the arbitration clause only said that she "understands" that all disputes are to be settled by arbitration, but the clause did not say that she "agrees" to such arbitration. Second, McKenzie claims that SETA fraudulently induced her to sign the employment application by hiding from her the company's knowledge that nonlawyers do not understand the meaning of arbitration. SETA responds on the merits, but it also argues that McKenzie's appeal should be dismissed because she failed to appeal from the confirmation order, the only appealable order in this case.

In an earlier order we dismissed McKenzie's appeal from the orders denying her motions to vacate the arbitration award. Those orders are not designated as appealable under the FAA, nor do they represent a "final decision" under the Act. *See* 9 U.S.C. § 16(a). We also have no choice except to dismiss the remaining portion of McKenzie's appeal. The one remaining order that McKenzie seeks to challenge, the interlocutory order granting the motion to compel arbitration, is not by itself an appealable order. *See id.* § 16(b)(3). In order to challenge it, McKenzie must have noted an appeal from a final decision or from an order designated as appealable under the FAA. *See F.C. Schaffer & Assocs. v. Demech Contractors, Ltd.*, 101 F.3d 40, 42-43 (5th Cir. 1996) ("[T]his court lacks jurisdiction to review the district court's decision regarding the arbitrability of the parties' dispute until there is an appealable, *i.e.* final, order."). Because there is no appealable order before us, we are without jurisdiction.

We would have jurisdiction if McKenzie had appealed from the confirmation order. At the time she filed her amended notice of appeal on May 5, 1999, she knew that SETA's motion to confirm the arbitral award was pending. Nevertheless, she chose to proceed with her appeal at that time. Two days after McKenzie filed her amended appeal, the district court issued its final decision, an order confirming the award. Because McKenzie did not note an appeal from that order, we must dismiss the remainder of this appeal for lack of jurisdiction.

DISMISSED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 4, 2001

No. 99-1576
CA-97-1038

ANGELA G. MCKENZIE

Plaintiff-Appellant

v.

SETA CORPORATION

Defendant-Appellee

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor
CLERK

FILED: February 23, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1576
(CA-97-1038)

ANGELA G. MCKENZIE,

Plaintiff-Appellant,

versus

SETA CORPORATION,

Defendant-Appellee.

ORDER

The Appellee has moved to dismiss the appeal with respect to the orders entered by the district court on March 29, 1999, and April 30, 1999. The Court grants the motion. The Appellant has moved to expedite consideration of the Appellee's motion for partial dismissal. We deny the motion as moot.

Entered at the direction of Judge Traxler, with the concurrence of Judge Michael and Judge King.

For the Court

/s/ Patricia S. Connor
Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANGELA G. McKENZIE **Plaintiff,**	)	
v.	)	**C.A. No. 97-1038-A**
SETA CORPORATION, **Defendant.**	)	

ORDER

This matter is before the Court on Defendant SETA Corporation's Motion to Dismiss and/or to Stay Action Pending Arbitration and to Compel Arbitration. Having considered Defendant's Motion and memorandum in support thereof, Plaintiff's response, and oral argument, the Court finds that the arbitration clause in Plaintiff's employment application is valid and pertains to a matter subject to arbitration. Accordingly, it is

ORDERED that the case is **STAYED** for one hundred eighty days (180) during which time the case shall be arbitrated.

It is further **ORDERED** that the parties shall consult the American Arbitration Association within thirty (30) days from the date of this order to identify and select an arbitrator for the case.

It is further **ORDERED** that the parties shall submit to the Court a joint status report sixty (60) days from the date of this order, and every sixty (60) days thereafter until the stay expires.

The clerk is **DIRECTED** to send a copy of this order to counsel for the parties.

signed Raymond P. Jackson
UNTIED STATES DISTRICT JUDGE

Date: August 22, 1997

IT is so **ORDERED.**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANGELA G. McKENZIE **Plaintiff,**	)	
v.	)	**C.A. No. 97-1038-A**
SETA CORPORATION, **Defendant.**	)	

ORDER

This motion comes before the Court the plaintiff's motion to rescind the Order compelling arbitration, vacate the arbitral award, and be granted her constitutional demand for jury trial. For reasons stated in the accompanying Memorandum Opinion, it is hereby,

ORDERED that plaintiff's motion to rescind the Order compelling arbitration, vacate the arbitral award, and be granted her constitutional demand for jury trial is DENIED.

signed Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

March 29, 1999

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANGELA G. McKENZIE	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. 97-1038-A**
	)	
SETA CORPORATION,	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

This matter comes before the Court the plaintiff's motion to rescind the Order compelling arbitration, vacate the arbitral award, and be granted her constitutional demand for jury trial.

The plaintiff filed suit in this Court on July 2, 1997. In her complaint, she asserted that she was discriminated against in her employment. Based on an arbitration clause that was contained in the defendant's employment application forms, signed by the plaintiff, the Court ruled in favor of SETA to compel arbitration. The plaintiff then filed with this Court a motion for resumption of the judicial proceeding upon termination of the stay of proceedings effective April 22, 1998. This motion was denied by this Court, finding there to be no basis for disturbing the ongoing arbitration.

The Arbitration commenced on August 15, 1998 and the parties were given a full hearing on Plaintiff's claims. The Arbitrator issued an award in favor of the defendant on January

7, 1999, however, required the defendant to pay the costs of the arbitration since the defendants had invoked the arbitration clause.

Plaintiff now comes forward and argues under her motion to rescind the Order compelling arbitration, vacate the arbitral award, and be granted her constitutional demand for jury trial alleging the defendant committed fraud on this Court when it moved this Court to compel arbitration. Plaintiff bases this allegation on the facts that the plaintiff only has a high school diploma, thus, not sophisticated enough to understand an arbitration clause in a contract, and that the defendant committed fraud on this Court when it suggested to this Court that the arbitration proceedings would be less expensive and shorter than Court litigation.

The plaintiff in this motion does not set forth a sufficient basis to justify the setting aside of the August 22, 1997 Order compelling the parties to go to arbitration. The plaintiff has the burden under Fed.R.Civ.P.60 to prove there was misconduct on the part of the defendant by clear and convincing evidence, and demonstrate that the misconduct prevented her from fully and fairly presenting her claims or defenses. See Square Construction Co. v. Washington Metro Area Transit Authority, 657 F.2d 68 (4th Cir. 1981); Moeller v. D'Arrigo, 163 F.R.D. 489,493-94 (E.D.Va. 1995).

Plaintiff, in her prior pleadings and motion to this Court, alleged that the arbitration process was inappropriate whereas it would be more lengthy and costly than litigation. To the extent that this motion is restating the same argument as her April 9, 1998 motion, it is improper. A Rule 60(b) motion is not for reconsideration of legal issues already addressed in an earlier ruling. See CNF construction, Inc. v. Donohoe Construction Co., 57 F.3d 395, 401 (4th Cir. 1995).

Plaintiff further argues that the defendant's failure to admit that the plaintiff could not have understood the arbitration

clause to which she agreed and prevented her from fully and fairly presenting her claims. However, the plaintiff was given her opportunity to be heard on this issue in this Court during the defendant's motion to compel arbitration. Plaintiff, in her opposition to that motion, claimed that she had not "agreed" to the arbitration clause when she signed the employment application with the arbitration clause. However, plaintiff did not claim that she did not understand what arbitration meant the time she signed the agreement. These facts that the plaintiff now comes forward with to this Court after there were full briefings and motions on this exact same issue, does not rise to the level of fraud on behalf of the defendant. Plaintiff was given a full and fair hearing on all her claims in front of the Arbitrator, and has not shown any evidence to this Court that she did not receive a fair and impartial arbitration hearing to rise to the level of vacating the arbitral award. Therefore, this Court should find that the plaintiff's motion be denied.

An appropriate Order shall issue.

signed Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
March 29, 1999

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANGELA G. McKENZIE	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. 97-1038-A**
	)	
SETA CORPORATION,	)	
Defendant.	)	
	)	

ORDER

This motion comes before the Court the plaintiff's motion to vacate the arbitral award. For reasons stated in the accompanying Memorandum Opinion, it is hereby,

ORDERED that the plaintiff's motion to vacate the arbitral award is DENIED.

signed Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
April 30, 1999

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANGELA G. McKENZIE	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. 97-1038-A**
	)	
SETA CORPORATION,	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

This motion comes before the Court the plaintiff's motion to vacate the arbitral award.

The plaintiff filed suit in this Court on July 2, 1997. In her complaint, she asserted that she was discriminated against in her employment. Based on an arbitration clause that was contained in the defendant's employment application forms, signed by the plaintiff, the Court ruled in favor of SETA to compel arbitration. The plaintiff then filed with this Court a motion for resumption of the judicial proceeding upon termination of the stay of proceedings effective April 22, 1998. This motion was denied by this Court, finding there to be no basis for disturbing the ongoing arbitration.

The arbitration commenced on August 15, 1998 and the parties were given a full hearing on Plaintiff's claims. The Arbitrator issued an award in favor of the defendant on January 7, 1999, however, required the defendant to pay the costs of the arbitration since the defendants had invoked the arbitration clause.

Plaintiff filed a motion to rescind the Order compelling arbitration, vacate the arbitral award, and be granted her constitutional demand for jury trial alleging the defendant committed fraud on this Court when it moved this Court to compel arbitration. This Court denied that motion based on the reasons stated in the Order and Accompanying Memorandum dated April 12,1999. Now the plaintiff comes before this Court on her motion to vacate the Arbitral award based on the allegation that there was evident partiality and misbehavior by the Arbitrator rendering the decision invalid, and that the Arbitrator fundamentally and irreparably abnegated the legally defined burden of proof, so imperfectly executing his powers that no proper award was made.

Plaintiff bases her motion on 9 U.S.C. § 10 of the Federal Arbitration Act ("FAA") which provides, in part, that an award may vacated where the award was procured by fraud, or undue means; where there was evident partiality in the arbitrators; and where the arbitrators exceeded their powers or so imperfectly executed them that a mutual final, and definite award upon the subject matter submitted was not made. The Fourth Circuit, however, grants arbitrators considerable leeway when reviewing arbitration awards. See Apex Plumbing Supply v. U.S. Supply Co., 142 F.3d 188, 193 (4th Cir. 1998); Remmey v. PainWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994).

To demonstrate evident partiality of an arbitrator, the plaintiff has the burden of proving that a reasonable person would have to conclude that the arbitrator was partial to the other party to the arbitration. See Consol. Coal v. Local 1643, United Mine Workers, 48F.3d 125, 129-30 (4th Cir. 1995); Remmey, 32 F.3d at 148-149. The partiality requires a showing of actual bias that is capable of demonstration rather than speculative allegation. The plaintiff must establish that specific facts indicate improper motives on the part of the arbitrator.

The plaintiff has not shown to this Court that there was

evidence of improper motives by the arbitrator, nor has she shown any actual bias. The Arbitrator found in favor of the plaintiff on several of the disputed matters, allowed for a continuance on the hearings over SETA's strong objections, and gave a thorough analysis and opinion as to why the Arbitrator ruled as he did.

The Fourth Circuit's rulings are clear, that even if there is a misinterpretation or misapplication of applicable law, it is insufficient to overturn an arbitration award. See Miller v. Prudential Bache Securities, Inc., 884 f.2d 128, 130-31 (4th Cir. 1989); Remmey, 32 f.3d at 146. Not only is an arbitrator's finding of fact entitled to great deference, even if an award results from faulty legal reasoning or erroneous legal conclusions, an arbitration award remains enforceable. See Upshur Coals Corp. v. UMWA, Dist.31, 933 F.2d 225, 229 (4th Cir. 1991). This Court is hesitant to allow the plaintiff the opportunity to re-litigate her case solely for the reasons that she is unhappy with the Arbitrator's outcome. To do so would render the binding process of the Arbitrator into a purely advisory one. See Remmey, 32 F.3d at 146. Federal policy favors arbitration and encourages arbitration precisely because it is deemed to be speedy, inexpensive and efficient way to resolve disputes without consuming court time. See Rainwater v. National Home Ins., Co., 944 F.2d 190, 192 (4th Cir. 1991). Therefore, the plaintiff's motion should be denied.

An appropriate Order shall issue.

signed Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
April 30, 1999

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANGELA G. McKENZIE	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. 97-1038-A**
	)	
SETA CORPORATION,	)	
Defendant.	)	
	)	

ORDER

This matter comes before the Court the defendant's motion to confirm the arbitration award. For the reasons stated from the bench, it is hereby,

ORDERED that the defendant's motion to confirm the arbitration award is GRANTED and the Arbitrator's award issued on January 6, 1999 is CONFIRMED.

signed Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
May 7, 1999